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No. 76

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The majority and minority opinions of the circuit court of appeals (R. 90–100) are reported in 140 F. 2d 873. The district court did not write an opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 11, 1944 (R. 100–101). The petition for a writ of certiorari was filed on May 3, 1944, and was granted on May 29, 1944 (R. 102). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a proceeding by the United States to acquire the temporary use of a business prop-

erty, necessary expenses incurred by the lessee in vacating the premises constitute an element of "just compensation" within the Fifth Amendment.

STATUTE INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App. Supp. III, sec. 632, is set forth in the Appendix, *infra*, pp. 26–27.

STATEMENT

The United States on June 8, 1942, instituted proceedings under Title II of the Second War Powers Act to condemn, for a term ending June 30, 1943, a portion of a warehouse needed in connection with the establishment by the War Department of a Signal Corps depot in Chicago (R. 1–3, 71–72). An order granting immediate possession was entered on the same day (R. 3). General Motors Corporation, the lessee occupant of the premises, began moving out on June 19, 1942 (R. 58). At the trial before a jury, the sole issue was the amount of compensation to be paid for the term commencing June 19, 1942, and ending June 30, 1943 (R. 68, 75). The pertinent facts are as follows:

The warehouse, containing a total of 195,840 square feet of floor space, is owned by the Clearing Industrial District, Inc., and was leased to the General Motors Corporation in 1928 for a

term ending May 31, 1948 (R. 74). It was used by General Motors as a master warehouse for the storage and distribution of automobile parts (R. 32). On January 1, 1942, the United States subleased about half of the warehouse (102,167 square feet) from General Motors at an annual rental of 40 cents per square foot (R. 75). Thereafter, the United States brought this proceeding to condemn the temporary use of the remainder of the building (93,673 square feet).

At the trial both parties introduced evidence as to the fair rental value of the property taken, the testimony varying from 35 to 42 cents per square foot (R. 11, 34, cf. R. 19–21, 32, 36–37, 75). General Motors then sought to prove damages and expenses incurred in "demolishing" and moving personal property from the warehouse and relocating it elsewhere (R. 38–45).[1] An offer was made to prove that the company had installed $101,000.00 worth of equipment (storage bins and other facilities) in the warehouse; that it had an inventory of $250,000.00 worth of parts and machinery located in the warehouse at the time of the taking; and that the expenses and losses incurred in moving were $83,598.39

[1] The word "demolished" as used in the offer of proof referred to the dismantling of equipment and not its destruction. The property and inventory removed were not fixtures. As General Motors' offer of proof states, the property "demolished" (i. e., dismantled and removed) was "bins and other personal property" (R. 41).

(R. 41–45). Included in the expenses and losses alleged to have been incurred were salaries and wages paid regular and special employees for time spent exclusively in moving, i. e., in preparing the property for moving, keeping track of it, moving it and receiving, unloading, checking and putting it away at the places to which it was shipped (Offers of Proof Nos. 1, 3, 4, 6–12, 14–16, R. 41–43); separation and vacation allowance payments made to employees discharged and not rehired (Offer of Proof No. 2, R. 42); wages for janitors and watchmen during the moving period (Offer of Proof No. 5, R. 42); state and federal unemployment and old age benefit taxes on salaries and wages paid for moving purposes, as well as lay-off benefits set aside in accordance with a plan in effect by General Motors (Offer of Proof No. 13; R. 43); cost of supplies and materials purchased or on hand which were used in moving (Offers of Proof Nos. 17, 18, 20, R. 43–44); telephone and telegraph charges incidental to arranging for shipment of parts and accessories (Offer of Proof No. 19, R. 44); freight charges on shipment of inventory and equipment to other cities (Offers of Proof Nos. 22–30, R. 44); unamortized cost of installing a burglar alarm system (Offer of Proof No. 31, R. 44–45); cost of renting storage space for fixed assets during the term of the Government's taking (Offer of Proof No. 32, R. 45); value of bin equipment destroyed during removal (Offer of Proof No. 33,

R. 45); cost of installing and moving fixed assets (Offer of Proof No. 33, R. 45).

The trial court excluded all evidence relating to the claim for removal expenses (R. 40), and rejected the respondent's offer of proof (R. 46). The jury's verdict of $38,597.86 or approximately 40 cents per square foot per year was thus based solely upon the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943 (R. 75; cf. R. 68–69). Judgment was entered accordingly (R. 82–83).

On appeal, the circuit court of appeals reversed the judgment of the district court (R. 100–101). It held that General Motors was entitled to prove, as an element of "just compensation" under the Fifth Amendment, the actual and necessary expenses directly incurred in vacating the property condemned, and that the respondent's offer of proof was therefore erroneously excluded (R. 90–99). Judge Minton dissented (R. 99–100).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that in a proceeding by the United States to acquire the temporary use of a business property, necessary expenses incurred by the lessee in vacating the premises constitute an element of "just compensation" within the Fifth Amendment.

2. In holding that the district court erroneously excluded respondent's offer to prove expenses

allegedly incurred in vacating the property condemned.

3. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

Under the Fifth Amendment the owner is entitled to just compensation for the property which the Government "takes". *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 326; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–282.

Not all losses suffered by an owner whose property is taken for public use are compensable. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–283; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Omnia Co.* v. *United States*, 261 U. S. 502, 510–511; *Bothwell* v. *United States*, 254 U. S. 231.

Among the losses most frequently held to be non-compensable is the expense incurred by the condemnee in vacating the premises taken. *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Potomac Electric Power Co.* v. *United States*, 85 F. 2d 243, 249 (App. D. C.), certiorari denied, 299 U. S. 565; *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5); *Pacific Live Stock Co.* v. *Warm Springs Irr. Dist.*, 270 Fed. 555, 559 (C. C. A. 9); *Wm. Wrigley, Jr., Co.* v. *United States*, 75 C. Cls.

569, 583–585; *United States* v. *0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562 (S. D. Cal.); *United States* v. *Building known as 651 Brannan Street*, 55 F. Supp. 667 (N. D. Cal.).

II

Although removal costs may be made compensable by statute, the settled policy of Congress has been to limit compensation to interests in the land taken. *Mitchell* v. *United States*, 267 U. S. 341, 346. Congress expressly reaffirmed this policy when it enacted the Second War Powers Act under which the present property was taken. Title II, Second War Powers Act (Appendix, pp. 26–27 *infra*); see 88 Cong. Rec., pp. 1649, 1653, 1654–1656.

If consequential damages are to be made compensable the intrinsic character of the problem calls for legislative formulation of specific standards and limitations, rather than an overturning by the courts of the basic principle that under the Constitution the Government pays only for the property which it takes.

ARGUMENT

I

JUST COMPENSATION FOR THE TAKING OF PROPERTY DOES NOT INCLUDE EXPENSES INCURRED IN VACATING THE PREMISES

The property condemned in this proceeding was the temporary use of part of a warehouse. In

fixing the compensation to be paid for the use of the space taken the district court excluded evidence of the expenses alleged to have been incurred by respondent because it had to move. Compensation was limited to the fair rental value of the space taken for the period for which it was sought. In other words, respondent's recovery was limited to the value of the property *taken*. No recovery was allowed for losses occurring as a result of the taking.

The Fifth Amendment requires the payment of just compensation for private property "taken" for public use. As Mr. Justice Brewer pointed out in *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 326: "* * * just compensation * * * is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken." "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81; see also *United States* v. *Miller*, 317 U. S. 369, 374; *Olson* v. *United States*, 292 U. S. 246, 255.

Consequential losses or injuries resulting from the taking are not compensable. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282; *Mitchell* v. *United States,* 267 U. S. 341, 345; *Joslin Co.* v. *Providence,* 262 U. S. 668, 676; *Omnia Co.* v. *United States,* 261 U. S. 502, 510–511. "* * * not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282. Thus, in the *Mitchell* case, *supra,* the owner was denied compensation for the destruction of his business which resulted from the taking of his land for a public project even though the business could not be reestablished elsewhere. In *Bothwell* v. *United States,* 254 U. S. 231, this Court held that there was no obligation on the part of the Government to pay the loss due to a forced sale of cattle and destruction of business resulting from the taking. Similarly, while the Fifth Amendment allows the owner the fair market value of his property, "it does not guarantee him a return of his investment." *United States ex rel. T. V. A.* v. *Powelson, supra,* at p. 285; *Olson* v. *United States,* 292 U. S. 246, 255. Likewise, the destruction of valuable contract rights involving property taken are not compensable although resulting in a pecuniary loss to the owner. "Frustration and appropriation are es-

sentially different things." *Omnia Co.* v. *United States,* 261 U. S. 502, 508–513. See also *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89, 94–95.

Among the losses most frequently held to be non-compensable is the expense incurred by the owner in moving personal property or a business from the premises condemned. *Joslin Co. v. Providence,* 262 U. S. 668, 676; *Potomac Electric Power Co.* v. *United States,* 85 F. 2d 243, 249 (App. D. C.), certiorari denied, 299 U. S. 565; *Futrovsky* v. *United States,* 66 F. 2d 215, 216–217 (App. D. C.); *Pacific Live Stock Co.* v. *Warm Springs Irr. Dist.,* 270 Fed. 555, 559 (C. C. A. 9); *United States* v. *0.64 Acres of Land in Los Angeles County,* 54 F. Supp. 562 (S. D. Cal.); *United States* v. *Building known as 651 Brannan Street,* 55 F. Supp. 667 (N. D. Cal.); cf. *Mitchell* v. *United States,* 267 U. S. 341, 345; *Bothwell* v. *United States,* 254 U. S. 231.

Likewise, attempts by a lessee to recover removal expenses in condemnation proceedings have been rejected repeatedly by the courts. *Gershon Bros. Co.* v. *United States,* 284 Fed. 849 (C. C. A. 5); *Wm. Wrigley, Jr., Co.* v. *United States,* 75 C. Cls. 569, 583–585; *Howard Co.* v. *United States,* 81 C. Cls. 646, 654; *Thermal Syndicate, Ltd.* v. *United States,* 81 C. Cls. 446, 454; *Chrystal* v. *United States,* 81 C. Cls. 461, 468; *United States* v. *Certain Parcels of Land, Etc.,* 54 F. Supp. 561 (S. D.

Cal.); *United States* v. *Improved Premises, Etc.*, 54 F. Supp. 469–472 (S. D. N. Y.); *United States* v. *Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258, 261 (S. D. N. Y.); *United States* v. *Meyers*, 190 Fed. 688 (Conn.).[2]

Neither General Motors' business nor its equipment and inventory have been taken. The right to use the warehouse only has been taken. The

[2] While recognizing that state law is not controlling (see *United States* v. *Miller*, 317 U. S. 369, 379–380), the court below relied upon statements of dubious authority found in several state decisions which run counter to the great weight of authority. *Chicago, M. & St. P. Ry. Co.* v. *Hock*, 118 Ill. 587 (1886); *Metropolitan West Side Elevated R. R. Co.* v. *Siegel*, 161 Ill. 638, 648–649 (1896), and *James McMillin Printing Co.* v. *Pittsburgh, C. & W. R. Co.*, 216 Pa. 504 (1907), have been discredited by subsequent decisions in the same jurisdictions. See *Braun* v. *Metropolitan West Side Elevated R. R. Co.*, 166 Ill. 434, 437–439 (1897); *Iron City Auto. Co.* v. *Pittsburgh*, 253 Pa. 478, 484–486, 493–494 (1916); cf. also *Becker* v. *Philadelphia & Reading R. R.*, 177 Pa. 252, 258–261 (1896).

Although many state constitutions require compensation for consequential damages resulting from public improvements, removal costs are excluded under the decisions in the great majority of the states. *Central Pac. R. R. Co.* v. *Pearson*, 35 Cal. 247, 263 (1868); *County of Los Angeles* v. *Signal R. Co.*, 86 Cal. App. 704, 710–712 (1927); *Mayor & C. C. of Balto.* v. *Gamse*, 132 Md. 290, 296–297 (1918); *New York, Etc. Railroad* v. *Blacker*, 178 Mass. 386, 391–393 (1901); *In re Assessment for Widening Third St., St. Paul*, 176 Minn. 389, 392 (1929); *St. Louis* v. *St. Louis, I. M. & S. Ry.*, 266 Mo. 694, 707 (1916); *Springfield S. W. Ry. Co.* v. *Schweitzer*, 173 Mo. App. 650, 655 (1913); *Ranlet* v. *Railroad*, 62 N. H. 561, 564 (1883); *Matter of New York, W. S. & B. R. Co.*, 35 Hun 633 (N. Y. 1885); *Fiorini* v. *Kenosha*, 208 Wis. 496, 499 (1932).

fact that personal property must be moved is incidental to the taking of the warehouse in which it was placed. It is not a taking or damaging of such property. *Wm. Wrigley, Jr., Co.* v. *United States*, 75 C. Cls. 569, 583–584. Cf. *Mitchell* v. *United States*, 267 U. S. 341, 345; *Bothwell* v. *United States*, 254 U. S. 231; *Futrovsky* v. *United States*, 66 F. 2d 215, 216–217 (App. D. C.). "As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to surrender of possession are not elements to be considered in determining the damages to which the owner is entitled." *Ranlet* v. *Railroad*, 62 N. H. 561, 564 (1883). "* * * for consequential loss or injury resulting from lawful governmental action, the law affords no remedy." *Omnia Co.* v. *United States*, 261 U. S. 502, 510–511.

As Judge Minton pointed out in his dissent (R. 99–100), moving expenses are none the less consequential when the Government condemns a temporary interest than when it condemns the fee. In *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5) the circumstances were identical with those in the present case. The United States had taken storage space for a temporary period during World War I. The Circuit Court of Appeals for the Fifth Circuit, in holding that expenses incurred in moving were not com-

pensable and that the lessee was entitled only to the market value of the property taken, said (284 Fed. at 850):

> The plaintiff asserted the right to recover more than the equivalent for the property taken, amounts in addition to the market value of the use of the space for the time the defendant had it. The "just compensation" to which the plaintiff was entitled is measured by the market value of its property taken. It was not entitled to more than that, because its expenses were increased in consequence of moving its business to another place. * * * The law charged the plaintiff with notice that it was subject to be deprived of the use of the leased premises by the exercise of the power of eminent domain. Inconvenience and expense incident to vacating premises upon the expiration of the right to retain them are not proper subjects of consideration, in determining the just compensation to be paid by the party acquiring the right to possess and use them.

Recovery of removal costs was also denied by the Court of Claims in cases where the temporary use of property was taken during the first World War. E. g., *Wm. Wrigley, Jr., Co.* v. *United States*, 75 C. Cls. 569, 583–585; *Howard Co.* v. *United States*, 81 C. Cls. 646, 654; *Thermal Syndicate, Ltd.* v. *United States*, 81 C. Cls. 446, 454; *Chrystal* v. *United States*, 81 C. Cls. 461, 468.

They have also been denied by several district courts in proceedings to condemn temporary interests during the present war. E. g., *United States* v. *0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562 (S. D. Cal.); *United States* v. *Improved Premises, Etc.*, 54 F. Supp. 469, 472 (S. D. N. Y.); *United States* v. *Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258, 261 (S. D. N. Y.); *United States* v. *Building known as 651 Brannan Street*, 55 F. Supp. 667 (N. D. Cal.). In the *0.64 Acres* and the *Brannan Street* cases it was the owner who was compelled to move out temporarily; the decision of the court below was cited but not followed because it was felt to be neither sound nor in accordance with well established principles of law.

The distinction made below between fee takings and the taking of a temporary interest is that what was taken here was not merely the property, but the right to use occupied property. This overlooks the fact that in all cases denying recovery for moving costs where the fee was taken the property was also occupied. Otherwise there would have been no occasion for claiming such expenses. Furthermore, the attempted distinction overlooks the principle that the compensation which the Government must pay for property which it condemns is the fair cash market value as between a willing buyer and a willing seller. *United States* v. *Miller*, 317 U. S. 369, 374. It is

true that the warehouse in question may have had special value to General Motors because it was then in possession. But special value to a particular user is not the test. *United States* v. *Honolulu Plantation Co.*, 122 Fed. 581, 584–585 (C. C. A. 9); *In re Furman Street*, 17 Wend. 649, 670–671 (N. Y. 1836); *United States* v. *Miller*, 317 U. S. 369, 375. In the *Honolulu Plantation* case the court said (p. 584):

> Compensation to be made for property taken by the exercise of the power of eminent domain is not its value to any particular company or individual, whether plaintiff, defendant, or anybody else, but the market value of such property at the time of the exercise of the power.
>
> * * * * *
>
> That the compensation to be made for land taken by the exercise of the power of eminent domain must be measured, not by its value to any particular person, but by the market value of the land at the time of the taking, is established by many authorities. * * *.

The fact that a particular user of property "may not want to part with his land because of its special adaptability to his own use * * * must be disregarded by the fact finding body in arriving at 'fair' market value." *United States* v. *Miller*, 317 U. S. 369, 375.

The court below explicitly refused to follow the rule applied by the Circuit Court of Appeals for

the Fifth Circuit in the *Gershon case*. It held, instead, that under the decisions of this Court in *United States* v. *Miller*, 317 U. S. 369, 373, *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304, and *United States* v. *New River Collieries Co.*, 262 U. S. 341, 345, a condemnee is entitled "to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (R. 94). We submit, however, that the standard applied by the court below departs from the established principle that consequential damages and incidental losses are not compensable, unless made so by statute (*supra* pp. 9–11). The rule expressed in *United States* v. *Miller*, 317 U. S. 369, 373, and in the other cases relied upon by the court below, that an owner is entitled to be put in as good position pecuniarily as if his property had not been taken, does not require that he be compensated for all injuries and business losses suffered. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–283; *Olson* v. *United States*, 292 U. S. 246, 255; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 94–95; *Mitchell* v. *United States*, 267 U. S. 341, 345; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Omnia Co.* v. *United States*, 261 U. S. 502, 508–513; *Bothwell* v. *United States*, 254 U. S. 231.

In *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, the compensation for the property was not ascertained and paid until some time after possession was taken. The only question was

whether the owner was entitled to interest on the award from the date of possession until payment. Interest was allowed as a means of giving the owner the value of the property at the time of the taking "paid contemporaneously with the taking." 261 U. S. at 306. It was in this connection that it was said that the owner was entitled to be put in as good a position pecuniarily as if his property had not been taken. 261 U. S. at 304. *United States* v. *New River Collieries*, 262 U. S. 341, clearly marks no departure from the accepted rule that just compensation is measured by the market value of the property taken. This Court there stated: "The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarly as it would have occupied if its property had not been taken. * * * Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. * * * More would be unjust to the United States and less would deny the owner what he is entitled to." 262 U. S. at 343–344. And it will be recalled that the owner in the *Miller* case, *supra*, was not left in as good a position pecuniarily as if his property had not been taken, since he was not permitted to recover the increment in value caused by the government project, an increment enjoyed by his neighbors whose lands were not taken.

This Court has repeatedly held that an owner

is put in as good position pecuniarily as he is entitled to when he is allowed the fair market value of the property taken paid contemporaneously with the taking. See *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343–344; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81. "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *United States ex rel. T. V. A.* v. *Powelson, supra*, at 281.

II

COMPENSATION FOR CONSEQUENTIAL LOSSES IS A MATTER FOR LEGISLATIVE RATHER THAN JUDICIAL ACTION

Although removal costs may be made compensable by express statute (*Joslin* v. *Providence*, 262 U. S. 668, 676), "the settled policy of Congress, in authorizing the taking of land and appurtenances, has been to limit the right to compensation to interests in the land taken." *Mitchell* v. *United States*, 267 U. S. 341, 346. This is all that the Constitution requires.

That Congress did not intend, when it passed the Second War Powers Act under which the present proceeding was brought, to broaden the compensation guaranteed by the Fifth Amendment is apparent from the legislative history of that Act. During the debates on the bill, the

following amendments were offered and rejected (88 Cong. Rec., pt. 2, pp. 1653, 1654, 1656 (1942)):

> The amount paid for any property taken shall include fair compensation for losses proximately caused by the taking in addition to the fair value of the property itself.

Substitute amendment:

> The amount paid for any property so taken shall include fair compensation for losses proximately caused by the taking in addition to the amount which would otherwise have been payable.

Congress considered and debated at some length whether losses in addition to the value of the property taken should be compensated for. These amendments were rejected. The debates show that Congress did not deem it wise in a time of great national peril to pay more for property than that required by the Constitution (see 88 Cong. Rec., pt. 2, pp. 1649, 1655–1656 (1942)). Among other things it was pointed out that persons other than those whose property was being taken for public use were suffering losses due to war exigencies and that it was impossible to make everyone pecuniarily "whole" (see 88 Cong. Rec., pt. 2, pp. 1649–1650).

If the just compensation guaranteed by the Fifth Amendment is to be broadened to include

certain consequential injuries, the matter is one of policy for Congress which should at least lay down some basic standard defining the extent of such recovery. The standard of compensation adopted by the court below opens the door not only to all manner of claims in the way of expenses incurred in vacating property condemned, but also to all other consequential losses such as injury to or destruction of business, losses on investments in property, no matter how improvident, and the like.

The present case discloses that the allowance of the costs incurred in vacating property condemned is of such nature as to warrant legislative relief, if any, rather than judicial. The items claimed by the respondent under the heading of removal costs cover a wide range. They include such disparate items as separation and vacation allowances paid to employees who were discharged and not rehired when the warehouse was closed down; telephone and telegraph charges incidental to arranging for shipment of inventory and equipment; and rent incurred for storing fixed assets during the period of occupancy by the Government. In similar cases claims have been based upon the increased rentals and bonuses paid for new premises; the cost of photographs of the new location which were sent to the principal office of the company; the cost of changing

advertising cuts; and the cost of paper drinking cups used by the movers. In a sense, all such costs are the inevitable consequences of vacating condemned premises, and hence compensable under the rule applied by the court below.

Even a cursory examination of some of the items indicates the innumerable collateral issues which must be inquired into and the speculation attending the effort to determine which expenses can properly be attributed solely to the condemnation and which ones were necessary. For example, how much of the cost of packing, including labor and materials, and how much of the freight charges would have been incurred in the regular course of distributing the parts stored in the Chicago warehouse? Was it necessary to ship the stock to six or seven different places—including points as far away as Kansas City and Minneapolis? Although for the purpose of future distributions it may have been more convenient for General Motors to ship its inventory to certain places, could it have been stored at less expense, albeit at less convenience, elsewhere? Respondent offered to prove that there was no available space in Chicago to store the equipment and stock (R. 45). Must the United States now investigate and attempt to prove that there was other available space suitable to General Motors' needs? This would seem to inject still another issue into

the case, namely, the suitability of other space for General Motors' purposes. The mere fact that it might not be possible to point immediately to another vacant warehouse obviously suitable would not foreclose the possibility of obtaining space. For example, in another case similar to this one which is now pending in the Circuit Court of Appeals of the Eighth Circuit[3] one of the items claimed as a necessary expense of moving was a bonus which it was contended had to be paid in order to sublease another warehouse. It is highly conjectural whether General Motors might not have obtained other space by the same means and whether its total moving expenses even with the bonus included might have been much less. The variations are unlimited, but unless the mere fact that the condemnee has incurred the expense and asserts it was necessary and the best he could do is sufficient to establish a right to have those expenses considered, inquiry into what he might have done would be necessary. The payment of vacation and separation allowances to employees discharged and not rehired when the warehouse was closed down—whether such allowances were already due the employees as part of their wages or were paid as a bonus by a beneficent employer—introduces a new element heretofore unknown in

[3] *Katz Drug Co.* v. *United States*, No. 12,681.

ascertaining just compensation for real property taken for public use.[4]

Moreover, although it may be conceded that a jury can reasonably be asked to determine what expenses are "actual," "necessary," and "directly incurred in vacating the property condemned" (R. 98–99), the rule adopted by the court below lacks that clarity of direction which is necessary if verdicts in condemnation cases are to be anything more than a financial expression of a jury's sympathies. The court below held that removal expenses may be considered "as an element of 'just compensation' guaranteed by the Fifth Amendment" (R. 91). Under this rule, what weight is to be given by the jury to them once their amount is ascertained? Are they to be included in the verdict at their dollar amount in addition to the sum fixed as the fair market value of the property taken? This would seem to be the

[4] In discussing some of the items claimed by respondent, it is not intended to concede that any of the others might properly be allowed under any circumstances or that any of them constitute "necessary" expenses "directly incurred in vacating the property condemned." For example, one of the items is rent incurred for storing equipment during the term condemned (R. 45). If General Motors had moved to another warehouse and continued its business, obviously it could not recover the rent paid for the new space. The fact that it has closed down its warehouse and stored its equipment temporarily rather than disposing of it, and has thereby sustained purely a business loss, in no way bears upon the value of what was taken.

only way in which a jury could properly "take into consideration" a fixed amount which it is instructed to regard as an element of just compensation.[5] However, the opinion does not clearly indicate that the court regarded the jury as bound to include the full amount of the removal expenses, and the court expressly rejected the view that removal expenses are recoverable "as such" (R. 91). Under the alternative theory, which seems to be that adopted by the court, the jury must give some weight to the removal expenses when ascertained, without instruction as to how much. The acceptance of such an indefinite criterion of just compensation must necessarily result in confusion.

As this Court pointed out in *United States* v. *Miller*, 317 U. S. 369, 374, the courts, in an effort to find some practical standard to measure compensation, "early adopted, and have retained, the concept of market value." "The concept of market value, judicially applied, attaches to property, never to the person of the owner. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463. If personal damage or detriment were intruded, the test of fair market value would become completely unstandardized and illusory." *United States* v.

[5] Such an interpretation would in this case have the effect of requiring the Government to pay General Motors approximately $1.29 per square foot for space substantially identical with space which six months earlier General Motors had been willing to lease to the Government at $0.40 per square foot.

Building known as 651 Brannan Street, 55 F. Supp. 667, 670 (N. D. Cal.).

We submit that if consequential damages are to be made compensable the intrinsic character of the problem calls for a legislative formulation of standards and limitations, rather than an overturning by the courts of the basic principle that under the Constitution the Government pays only for the property which it takes.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the district court correctly ruled that the measure of compensation to which the respondent was entitled under the Fifth Amendment was limited to the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943, and that the judgment of the circuit court of appeals providing for the recovery of removal expenses should be reversed.

CHARLES FAHY,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

VERNON L. WILKINSON,
WILMA C. MARTIN,
Attorneys, Department of Justice.

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APPENDIX

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. III, sec. 632, provides as follows:

> SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:
>
> "SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be

occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

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